IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT

ST. CLAIR COUNTY, ILLINOIS

CHARLES KUEPER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 91-L-734
	)	
R.J. REYNOLDS TOBACCO COMPANY, THE TOBACCO INSTITUTE, INC., and REESE DRUGS, INC.,	)	
	)	
Defendants.	)	

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REPORT OF PROCEEDINGS

January 11, 1993

Before the HONORABLE JAMES K. DONOVAN, Circuit Judge

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APPEARANCES:

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Attorneys at Law,
On behalf of Defendant R.J. Reynolds Tobacco Company;

MR. LARRY HEPLER, MR. THEODORE J. MacDONALD, JR.,
and MR. JAMES GOOLD,
Attorneys at Law,
On behalf of Defendant Tobacco Institute; and

MR. MICHAEL J. NESTER, Attorney at Law,
On behalf of Defendant Reese Drugs, Inc.

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jurors retook their seat in the jury box,
and the following continued of record.)

THE COURT: We're going to bring you up to date on where we're at with the testimony.

I'm going to try to explain to you what happened in the last, I guess, between quarter after eleven and eleven forty-five this morning. We took a break, and we were able to locate the video-- not the video, the audio cassette of the transcript of the interview that the witness was talking about. And Mr. Cook was reviewing it, listening to it, and he asked that-- After he had reviewed it, he asked that I listen to it and the other attorneys, to a portion of the tape.

When he went to play it for us, he hit the "record" button instead of the "play" button. Okay? So, he recorded over the part that he wanted each of the attorneys to listen to, and we were all in chambers.

Now,-- So, Mr. Crist has been on the phone to locate us-- try to locate us another copy of that. And so, there is no mystery to any of this. And I wanted to explain it to you just so there wouldn't be any mystery or what-- why we're going-- proceeding this way now.

We're going to now do, I believe, a evidence deposition of Dr. Best. Is that correct?

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MR. COOK: That's true, Your Honor.

THE COURT: When did that deposition take place?

MR. COOK: Unless I recorded over the top of it, it would be--

THE COURT: Okay.

MR. COOK: It took place on November the 30th, 1992. We interrupted the trial so we could go over and take it on that day.

THE COURT: And this was taken at the doctor's office?

MR. COOK: Taken at the doctor's office, Your Honor.

THE COURT: Okay. Now, this is an evidence deposition. It was taken at the doctor's office. The attorneys were each present. They were allowed to examine the doctor as if he were in the courtroom.

Many times, evidence depositions are taken because the schedule of the witness will not permit them to be here in person exactly the point in time when we would like for them to be here.

You're to consider this as if the witness were here. You're not to give it any more or any less weight than you would have given if the witness would have appeared here in person.

Now, due to the fact it's a video tape, I have had a

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chance to review the transcript of it with the lawyers. As in-- with any other witnesses, there might have been objections. Those objections I've already ruled on. And you'll only see the portion of the tape after the discussion of the objection is completed. But you might notice, and we don't think you will, but you might notice what might appear to be a chopped or an edited video tape. But that's based on my rulings.

So now, we are going to proceed.

Is there any other preliminary matters?

MR. COOK: Your Honor, Mr. Mudge is-- in light of my electronic sophistication,--

THE COURT: Yes.

MR. COOK: --is going to play the tape.

THE COURT: Okay.

Come on up, Mr.--

JUROR: Excuse me, Judge. Could you turn that a little bit--

THE COURT: Yeah.

JUROR: --so all the jurors can see it, not just the ones in front of it?

THE COURT: Yeah. Mr. Mudge, can you move that around till everybody can see okay?

(Mr. Mudge moved television set at this

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time.)

JUROR: That's fine.

THE COURT: Is everybody okay?

(Jurors indicated affirmatively.)

THE COURT: Okay, and we'll adjust the volume if anybody needs it up or down or something.

Go ahead.

(At this time, the video tape was turned on and played for the jury as follows.)

"COURT REPORTER: Doctor, would you please raise your right hand and be sworn.

Do you solemnly swear that the testimony that you're about to give is the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do."

DIRECT EXAMINATION

BY MR. COOK:

"Q Would you state your name and address, sir?

A John Arthur Best, [DELETED]

Q Dr. Best, my name is Bruce Cook, and I represent one of your patients, Charles Kueper. You know Charles Kueper, do you not?

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A Yes, I do.

Q Doctor, are you a medical doctor, sir?

A Yes, sir.

Q And can you tell the jury, sir, what medical school you attended?

A I went to school at the University of Rome at Italy.

Q And what year did you graduate?

A 1977.

Q And following your graduation did you-- is the degree an M.D. Degree?

A Yes, sir.

Q And following your graduation, what did you do next, professionally, sir?

A Did a internship and residency at St. Luke's Hospital here in St. Louis for the next four years.

Q Maybe I should ask you, where did you do your undergraduate training?

A Indiana University.

Q And where were you raised?

A Indiana.

Q And so your-- your initial foray into the St. Louis area would be when you were doing your residency and internship?

A That's correct.

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Q And what field did you do your residency and internship in, sir?

A Internal medicine.

Q And after you-- What is internal medicine?

A It's the diagnosis and treatment of nonsurgical diseases.

Q And St. Luke's is located out here in Chesterfield on Woods Mill Road,--

A That's correct.

Q --or something like that?

A At that time, it was located on Delmar Boulevard in the city.

Q 5555 Delmar?

A Yes, sir.

Q My sister went to nursing school there.

After you completed your residency, what did you do next, professionally?

A I spent a year at St. Luke's-- This would be the fourth year as-- part of the year as chief resident and part of the year as a cardiology fellow.

Q Okay. What's that? What's a cardiology fellow?

A Additional specialty training limited to cardiology, diseases of the heart.

Q And then after that what did you do next,

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professionally?

A Then I went to St. Louis University and did a pulmonary fellowship for two years.

Q And that's at Firmin Desloge?

A Firmin Desloge.

Q Firmin Desloge.

What is-- Well, what is pulmonary medicine, I guess?

A It's a subspecialty of internal medicine dealing with diseases of the-- of the lungs, basically.

Q And for that fellowship, then what would you have done at St. Louis University?

A It was predominantly a clinical fellowship. We saw patients, did consultations, evaluated patients with lung diseases of various kinds, treated them.

Q And, let's see, what year then would you have completed your pulmonary fellowship?

A 1984.

Q And following that, what did you do next, professionally?

A I joined this group in 1984 in private practice.

Q What doctors are you in practice here with, sir?

A Drs. Potts, Dew, Phillips, Alegre and Zambrano.

Q Are they all pulmonologists?

A No, three are cardiologists, and the other two are

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pulmonologists.

Q Okay. And is your practice generally confined to St. Luke's?

A Yes.

Q Are you on the staff at any other hospital besides St. Luke's?

A No.

Q What states or state are you licensed to practice medicine in?

A Missouri.

Q And do you belong to any professional associations or societies, sir?

A I'm in the local chapter of the American Medical Association, the American College of Chest Physicians, and American College of Physicians.

Q Okay. In connection with your practice as a pulmonologist, have you had occasion to see Charles Kueper?

A Yes, sir.

Q Do you have your record with you, Doctor?

A It's in my office.

Q Do you need it?

A I don't know. I'll try without it.

Q Okay. Do you recall when you first saw Mr. Kueper?

A I believe it was August of '91.

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Q Okay. And did you receive a history of any kind from him or from other sources at that time?

A I took a history from his wife and him at that time. I had no outside records I don't believe at that time.

Q How did they happen to get to you? Do you have any idea?

A As I recall, she had wanted to take him to her lung specialist, who was out of town; and one of the radiation oncology people at Barnes who had treated him gave my name or this office name, and that's how they found their way out here.

Q And what was the history that you had received, Doctor?

A That he had been diagnosed to have lung cancer the preceding spring and had undergone external radiation treatment because he was deemed not to be a surgical candidate for treatment, had completed that in the spring and apparently done reasonably well up to that point but was having some shortness of breath and cough, chest congestion, that sort of thing.

Q Doctor, when you say that he was not a surgical candidate, what does that mean?

A The physicians who evaluated him deemed his case to be one that could not be totally removed from the lungs

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successfully, so there was no point in proceeding with surgery.

Q Do you know who those physicians was or were?

A As far as I know, it was Dr. Charles Roper.

Q Is he a physician known to you to be a-- the prominent physician in this community?

A Yes, sir.

Q And what is his specialty, do you know?

A He's a thoracic surgeon.

Q Did you receive a history from Mr. Kueper relating to cigarette usage?

A He certainly told me at that time that he had been a smoker.

Q Okay. Did you start any course of treatment then with Mr. Kueper-- or, did you make an examination of Mr. Kueper?

A Yes, I did.

Q I haven't done one of these for a while.

What did you-- What were your findings, Doctor?

A I don't recall exactly. I don't think there were a lot of positive findings or abnormalities at that time. I recall it was a fairly normal examination at that point.

Q Okay. Did you start a course of treatment for him, sir?

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A I believe that he underwent a bronchoscopy examination of the inside of the airways at that time to see if there was any--

Q By you?

A By me, to see if there was progression of his cancer that might be treated. And that examination was unremarkable.

Q Okay. You understood at that time that he had already had radiation therapy?

A That's correct.

Q What is the desired effect of the radiation on-- on any lung mass or--

A The desired effect is the destruction of the tumor and causing remission of the disease.

Q Okay. What was done next for Mr. Kueper, Doctor?

A I may have given him some medication for his airways, some inhalers or something to help his cough and congestion, antibiotics;-- I don't recall exactly. --and he went on his way and carried on his normal activities for several months.

Q All right. And when did you next see him then, Doctor?

A I really ought to have my records, I think.

Q I think so, too. Why don't we take a break.

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(pause)

Q (Mr. Cook) Dr. Best, you now have your record of Charles Kueper in front of you, is that true?

A Yes.

Q And then when did you next see Mr. Kueper after the initial visit, sir?

A The next time was December 27, apparently, of '91.

Q And what was the occasion of you seeing him at that time?

A He was having some chest tightness, some chest pains, and increased phlegm production.

Q What did you--

A He apparently also had a CAT scan done that showed some fluid around the right lung and a bone scan, which was normal.

Q The CT scan, did you base a portion of your treatment on that scan, sir?

A (nodding)

Q Can you relate to me what the-- when the scan was taken or where it was taken and--

A It was taken at Scott Air Force Base as all his x-rays have, as far as I recall. It would have been done within several days of this visit.

Q Did you receive a report from the CT scan, of the CT

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scan?

A No. I received information about it, but I don't know in what form. I don't have a written report here, but the results were known to me either through Mr. Kueper or possibly by telephone. I'm not sure.

Q What was the information that you had received with respect to the CT scan?

A Well, what my note says was there was more fluid and slight abnormality of the right lung.

Q Okay. So, Doctor, when you saw him next, then what did you have-- what was your next treatment that you gave him?

A Well, at that time, he had some wheezing in his lungs on both sides, not just the right side; and I felt that the cause of his complaints was more obstructive lung disease rather than the cancer and put him on inhalers, dilators for the lungs at that point.

Q Did you think that he didn't have cancer at that time?

A No. No.

Q I must have misunderstood you.

Q I didn't think that was the cause of his problem requiring this visit.

Q What's the purpose of the inhaler?

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A To improve his breathing and coughing and so forth, chest tightness.

Q What is chronic obstructive pulmonary disease, Doctor?

A It's a disease where the air flow in the lung is reduced due to thickening, spasm of the airways, increased secretions.

Q Basing your answer upon a reasonable degree of medical certainty, upon your examination and treatment of-- of Mr. Kueper, and upon the history of his smoking, is that a disease that might or could be caused by cigarette smoking?

A Yes.

Q Did-- What's the purpose-- What is chronic obstructive pulmonary disease as compared to emphysema or--

A That's just a broad term, includes all obstructive diseases including emphysema, chronic bronchitis, chronic asthma.

Q Okay. What did you-- Did the inhalers give him some relief, Doctor, or--

A It didn't seem to do too much. He returned in January.

Q What was his condition at that time, Doctor?

A At that time, he was short of breath, had discolored sputum and some blood in his sputum.

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Q What's that indicative of?

A Well, it's nonspecific. It can indicate infection. It can indicate tumor or cancer. However, he had only been using his-- he was still working and was only using the medication I gave him twice a day. He was still wheezing, had a very significant cough, and he was given antibiotics and a steroid inhaler and told to use the other inhalers four times a day.

Q When did you see him next, Doctor?

A Next was February 11th for another bronchoscopy because he continued to have the blood-streaked sputum.

Q And was that-- What were the results of that bronchoscopy?

A It was also negative.

Q What does that mean, Doctor?

A I saw no evidence of any abnormalities, any bleeding or visible tumor.

Q What do you do when you do a bronchoscopy?

A It's a flexible instrument that's magnified, lighted, allows inspection of the larger airways of the lung directly. They're directly visualized. You can go down into one or two divisions inside each lobe of the lung.

Q Which divisions can you go into?

A Well, there are different lobes in each lung, and

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you can go into the branches of these lobes out for a period of 1 to 2 inches, I would say, with the scope and look out inside those air tubes.

Q Does that rule out any tumor if you do that and you don't see anything?

A No. No.

MR. STUHAN: The doctor answered before I had a chance to assert my objection, but I object to the form of that question.

MR. COOK: May I ask what you would like me to do to modify the form of the question?

MR. STUHAN: The question was leading.

Q (Mr. Cook) Doctor, does a bronchoscopy that is negative rule out the existence of a tumor on Mr. Kueper?

A No, it does not.

Q Following that bronchoscopy, what did you do next for Charlie?

A As I recall, this was in the hospital, and I don't have any-- that record. But he was contemplating a trip out of town; and because the bronchoscopy didn't show a bleeding site or anything that would make it dangerous for him to leave town, he was allowed to go and continue on the same medication. He had no recurrence of the bleeding after that time.

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Q Okay. Can you tell us about your next visit with Charlie then?

A Apparently, the next visit was-- I had some phone calls in between, but the next visit was in October--

A And--

A --of this year.

Q What was the purpose of that visit, sir?

A He was having some back pain off and on, worse with lifting and driving his truck, had it for about two weeks, got some relief by taking Tylenol with codeine. He was given some Motrin and Robaxin to see if that would help his back pain.

Q Did-- Was a bone--

A There was no obvious cause.

Q Was a bone scan performed on him, Doctor?

A It was performed after that visit over at Scott Air Force Base. The report I get is that it was negative.

Q Which means that it hasn't metastasized to--

A That's correct, no evidence of metastasis to the bones.

Q You're following Charlie along with doctors from Scott Field at the same time?

A That's correct.

Q Doctor, have you reached a diagnosis with respect to

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Charles Kueper's condition?

A Charles Kueper, to my knowledge, has lung cancer. This is based on all of the information that I've received from his previous physicians. He also has some episodes of wheezing and coughing which are related to obstructive lung disease. He has chronic pain of recent onset, the cause of which I've yet to determine, but I suspect it is related to his lung cancer.

Q Doctor, do you treat a number of patients with lung cancer?

A Yes, sir.

Q Would 'number' mean more than a hundred--

A Yes.

Q --in your career?

A Yes.

Q Many more or--

A Many more, several hundred.

Q How many, to you-- How many patients, to your recollection, who have primary lung cancers that you've treated were not cigarette smokers?

A Sitting here now, I can't recall of any. I won't say there are none, but they're rare.

Q Doctor, I want you to assume for a minute that-- that Charles Kueper smoked from the time he was 17 years old,

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regularly, cigarettes for over 30 years at a pack-and-a-half-a-day habit.

I want you further to assume that Mr. Kueper has been diagnosed by you and by others as having lung cancer. Basing your answer upon a reasonable degree of medical certainty, do you have an opinion as to whether there is a causal connection with the disease that you've treated Charlie for and his habit of cigarette smoking?

A It's my opinion that-- that based on my experience and what I've read over the years, that clearly his lung cancer can be attributed to his cigarette smoking.

Q Doctor, have you ever smoked?

A Yes, I have.

Q When's the last time you smoked?

A I had one today.

Q All right. How long have you smoked?

A 23 years.

Q All right. How many-- Have you ever tried to quit smoking?

A Yes.

Q Have you tried to quit smoking more than one time?

A Yes.

Q How many times have you tried to quit smoking, Dr. Best?

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A It really depends on how you define 'trying to quit smoking.' Waking up and planning not to buy any that day, then I've quit-- tried to quit a hundred times. Seriously tried, maybe three.

Q Have you ever used any aids to assist you in trying to quit?

A Yes.

Q What type of aids?

A I tried hypnosis. I tried Nicorette gum. I tried auricular therapy.

Q Ooh, what's that?

A I'm not even sure. They treat your ears with some sort of electricity. If you go through that, you should quit. And I tried the nicotine patches. Hypnosis twice.

Q As of late, you're not smoking quite as much as you used to, I understand?

A No, that's correct. I haven't bought any cigarettes since June.

Q Did-- Did you-- Did the nicotine patch work for you?

A It-- It, I think, clearly reduced my craving for cigarettes, but it didn't satisfy all the desires associated with cigarette smoking for me.

Q Doctor, what's Charlie Kueper's prognosis?

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A He has, I think, less than a 5 percent chance of survival beyond five years or to five years, we'll say.

Q What-- What about-- What's the short term?

A With his degree of involvement, he has about only a 20 percent chance of living two years after diagnosis.

Q Is lung cancer a particularly-- Well, what is the reasonable expectation of what his course will be as he becomes terminal?

MR. STUHAN: Object to the form of the question; calls for speculation.

Q (Mr. Cook) Doctor, basing your answer upon a reasonable degree of medical certainty and upon your experience and your treatment of patients including Charles Kueper, is there a classification of the type of disease in terms of numbers that he has?

A I'm not sure I understand the question.

Q I thought there was a Class I or a Class II or that--

A Oh. Oh. He's said to have a Class III lung cancer.

Q What does that mean?

A That means that he cannot be cured by surgery, and chances are he cannot be cured by any other method including radiation therapy.

Q The-- Basing your answer upon a reasonable degree

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of medical certainty, what is the reasonable expectation that-- of future hospitalization for Mr. Kueper?

MR. STUHAN: Object to the form of the question and calls for speculation.

A Patients with tumors that are not removed and cured invariably dwindle, physically, become weaker, lose weight, often develop severe pains and deteriorate either at home and/or in the hospital and die, usually within two years.

MR. COOK: Okay. I believe that's all I have. Thank you.

CROSS EXAMINATION

BY MR. STUHAN:

Q Doctor, my name is Richard Stuhan. I'm one of the attorneys for RJ Reynolds Tobacco Company, which is one of the defendants in this case. You and I have met once before, is that correct?

A Yes, sir.

Q And that was when we took your deposition last May, is that right?

A I recall the deposition. I'm not sure of what month it was.

Q Several months ago?

A Yes.

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Q And that was the only other time that you and I have met?

A Yes, sir.

Q And we took that deposition here in your-- your offices in Chesterfield?

A Correct.

Q I'd like to begin by making sure that I understand precisely what your involvement with-- with Mr. Kueper has been.

Now, if I understand correctly, Doctor, you are not the physician who originally diagnosed Mr. Kueper's cancer, is that correct?

A That's correct.

Q And that determination was made by some physicians at Scott Air Force Base, is that right?

A That's right.

Q And that determination was made back in March of 1991, correct?

A Yes.

Q Roughly that time?

A Roughly, it was in the spring of '91, yes.

Q And you didn't see Mr. Kueper until about five months later in August of 1991, is that right?

A That's right.

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Q Now, when you saw Mr. Kueper on August, I believe it was the 14th-- of 1991, that wasn't only the first time you had seen him in connection with his present illness; that was the first time you had ever seen him period, correct?

A Correct.

Q You have never treated Mr. Kueper for any previous illness?

A No, I haven't.

Q And you were not and are not-- or, rather, you were not at that time Mr. Kueper's family physician?

A That's correct.

Q Were you aware, Doctor, that by the time that Mr. Kueper landed in your office, that he had already seen more than 30 physicians in connection with his present illness?

A No.

Q You did know that he had seen a bunch of other physicians, though, is that correct?

A Yes.

Q And you knew that he had seen oncologists, other pulmonologists, pathologists, radiologists, surgeons, general practitioners in connections with his illness?

A Yes.

Q Now, before you-- you first saw Mr. Kueper in August of 1991, his physicians at Scott Air Force Base had

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taken a number of diagnostic x-rays and CT scans, is that correct?

A That's correct.

Q And you didn't order any of those CT scans, is that correct?

A No.

Q Now, in addition to having those diagnostic x-ray procedures before he came to see you, Mr.-- Mr. Kueper had had two exploratory operations, one, a bronchoscopy, and another, a mediastinoscopy, is that right?

A Yes, sir.

Q And those procedures were both done at Scott Air Force Base, as far as you know?

A As far as I know.

Q And you weren't involved in either of those procedures?

A No, sir.

Q And-- And after the physicians at Scott in the course of one of those procedures had-- had found some cancer, there was consideration given to various treatment options, is that your understanding?

A Yes, sir.

Q And consideration was given to chemotherapy, radiation therapy, and surgery?

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A Yes.

Q And you didn't participate in any of those discussions?

A No, sir.

Q And the decision to proceed with radiation therapy was made by Mr. Kueper in connection with other physicians?

A Yes.

Q And you didn't participate in that decision either?

A No.

Q Now, Mr.-- Mr. Kueper received radiation therapy at Barnes Hospital, is that correct?

A Yes.

Q And he received about 7,000 rads of radiation, is that correct?

A As far as I know, yes.

Q And that's really more than the standard dose, isn't it?

A Yes.

Q Pretty hefty dose actually, isn't it?

A Well, I'm not a radiation oncologist. I think 6,000 is not unusual, and sometimes we boost people higher than that with bronchial radiation.

Q Well, it would be correct that in order to get that much radiation, that an individual would have to have

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thousands, literally thousands of routine chest x-rays?

A Yes.

Q Were you involved in any way in deciding how much radiation Mr. Kueper was to receive?

A No.

Q Were you involved in any way in the administration of radiation therapy to-- to Mr. Kueper?

A No, sir.

Q Would it be correct to say, Doctor,-- Dr. Best, that by the time you came on the scene, that the diagnosis of cancer had already been made with respect to Mr. Kueper?

A Yes, sir.

Q Would it be correct to say that by the time that you became his physician, that treatment options had already been considered?

A Yes, sir.

Q Would it be fair to say that by the time you came on the scene, his therapy had already been completed?

A Yes, sir.

Q Your role then with respect to Mr. Kueper, as I understand it, is essentially palliative; that is, your job is to make him as comfortable as possible?

A Yes, sir.

MR. STUHAN: Bruce, we need to spend a little time

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getting some exhibits organized here. Why don't we take about a five--- five-minute break.

(A short recess was taken {at deposition}).

Q (Mr. Stuhan) Doctor, the diagnosis of cancer in Mr. Kueper was made on the basis of tissue that was removed from him during a surgical procedure, is that correct?

A Yes, sir.

Q And the tissue, after it was removed during the surgery, was mounted on a slide and examined under a microscope, is that-- is that right?

A Yes, sir.

Q And the tissue was examined by a pathologist?

A Correct.

Q And a pathologist, if I understand medical specialties, is a physician who specializes in diagnosing abnormal changes in tissue that was removed either during a surgical procedure, as here, or during an autopsy, is that right?

A That's right.

Q You're not a pathologist?

A No, I'm not.

Q So, if you needed to determine whether tissue had cancer cells in it, you would send the tissue to a pathologist for that determination?

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A Yes, sir.

Q And if you needed to know what type of cancer a particular patient had, you would also rely on a pathologist for that determination?

A Yes, sir.

Q Doctor, I've set before you here a diagram that we've had prepared of the lungs, trachea, and-- and bronchi. And I recognize that it's a rather crude rendition, but would you agree with me that it's at least a rough approximation of this portion of the respiratory system?

A Yes, sir.

Q Now, Doctor, using the diagram, if you-- if you could, could you show the path that smoke takes in a cigarette smoker after it's inhaled through the mouth and travels down the respiratory tree?

A It travels down the trachea and through the various bronchi throughout the lungs into the smaller airways.

Q Okay. Now, the smoke comes down the trachea, and the trachea at this point here divides into a-- into a right and a left portion, is that correct?

A That's correct.

Q And this point of division here is known as the carina?

A Yes, sir.

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Q So, the full volume of smoke that comes down the trachea then gets split up here, and some of it goes in this direction and some of it goes in this direction, is that correct?

A Correct.

Q So, there would be a larger concentration of cigarette smoke in the trachea than in either of these large bronchi; would that be fair to say?

A Interesting question. I hadn't thought of it.

Q Well, would you think about it now?

A Yeah, I'll think about it. I would say-- I would say the concentration would be the same. You're not adding anything. They're diluted down here.

Q Well, I-- Maybe my question was ill-phrased. But there's going to be less smoke here or here than there is here because the volume of smoke that was in here was divided into two different segments, is that right?

A I see your point, but as you inhale-- I've never done the test. It might be less here. Because as you breathe, you're sucking it down into the lungs and with fresher air coming in behind, so I don't know if that's true or not.

Q Okay. You hadn't thought about it?

A Hadn't thought about it before.

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Q Okay.

Now, we talked before about the surgical procedure by which cancer was found in-- in Mr. Kueper. Is it not the case, Doctor, that the cancer that was found in Mr. Kueper was found in this area between the lungs here called the mediastinum?

A Yes.

Q Now, before cancer was found in the mediastinum during the surgical procedure-- That's called a mediastinoscopy, is that correct?

A That's correct.

Q Before the cancer was found in the mediastinum, Mr. Kueper's physicians at Scott Air Force Base made an effort to see if there was any cancer in the bronchi, themselves, is that right?

A That's right.

Q And they did that by performing a procedure called a bronchoscopy?

A Correct.

Q And you, yourself, have done bronchoscopies,--

A Yes.

Q --is that right?

A Yes.

Q Probably dozens of them?

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A Yes.

Q Now, when a bronchoscopy is performed,-- You started explaining some of this in response to Mr. Cook's questions. --a surgical instrument is inserted down the trachea, is that right?

A That's correct.

Q And into the bronchi?

A Yes.

Q And goes right out into the lungs, themselves, is that right?

A That's correct.

Q And you can look down the flexible bronchoscope and actually see out into the lungs, is that correct?

A Yes.

Q And it's also possible during the bronchoscopy to insert an instrument down there through the tube and remove tissue from within the lungs, themselves?

A That's correct.

Q You mentioned as part of your direct testimony that back in the spring of 1991, a bronchoscopy was-- was done at Scott Air Force Base. Do you recall that?

A Yes, I do.

Q I'd like to show you a copy of the bronchoscopy report that was generated by Dr. Dilley at that time. It's

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been previously marked for identification as Defendant's Exhibit 3. Would you take a moment to take a look at that, please?

(pause)

Q (Mr. Stuhan) Now, Doctor, as far as you can tell from the report, which I've just-- just shown you, and such other records as you've had an opportunity to review, did Dr. Dilley conduct a reasonably thorough bronchoscopy?

A Yes, sir.

Q During his deposition, Dr. Dilley testified that he went into the fifth or sixth generation of bronchi during the bronchoscopy. Using the diagram here, can you give us some indication of how far out he went?

A He would have been in these orifices here, each segment of the different lobes looking out into these smaller air tubes.

Q And that's how far the instrument was passed?

A That's the bronchoscope. It would be passed into about this level is as far as it would go.

Q Okay. And if the instrument is passed--

A It would allow him to examine farther out into some of these other divisions.

Q You've answered my next three questions. Thank you. Now, during the bronchoscopy that Dr. Dilley performed--

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in, I think that that record will show-- February of 1991, he was not able to visualize any tumor at all in Mr. Kueper's lungs, is that correct?

A That's correct.

Q Would it be fair to say then that when Dr. Dilley did the bronchoscopy in February of 1991, he didn't see any cancer in Mr. Kueper's lungs?

A He didn't see any direct evidence of cancer.

Q Did he see any indirect evidence of cancer?

A Some of these abnormalities of the upper lobe and the middle lobe certainly are consistent with or can be seen with cancer.

Q What abnormalities are you thinking of?

A He's talking about swelling, redness of the bronchus, and extrinsic compression of these bronchi.

Q Well, Doctor, you would agree, though, wouldn't you, that those are nonspecific symptoms?

A Yes, I would.

Q They could represent any one of a number of conditions, is that correct?

A It is if you don't have adenopathy that a biopsy shows has cancer in it.

Q Is there anything in Dr. Dilley's report which suggests that he saw cancer?

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A Not at that time, no.

Q Is there anything that suggests that Dr. Dilley saw cancer at any other time?

A No.

Q Now, during the bronchoscopy that he performed, Dr. Dilley removed tissue samples for microscopic examination, is that-- is that correct?

A Yes, sir.

Q Doctor, I'd like to show you copies of the pathology reports for the-- for the tissue removed during that bronchoscopy. They've previously been marked for identification as Defendant's Exhibit 4 and 5.

MR. COOK: Can you identify those by date, please?"

(At this time, the video deposition was turned off.)

THE COURT: We're going to break now. We're going to continue with the evidence deposition when we come back. But let's take ten minutes.

Okay.

(At this time, a recess was taken.)

* * * * *

(The following proceedings were reported by Patricia Sullivan, C.S.R. No. 084-000785.)

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THE COURT: Okay. Have we got everybody? Yes. Do you want to flip it back on? Is Mr. Cook over there? Yes.

(The cross examination by videotape of Dr. Best by Mr. Stuhan continued as follows.)

Q Sure. Defendant's Exhibit 4 is signed by Dr. Goodwin. It's dated February 28, 1991. And, Defendant's Exhibit 5 is signed by a Dr. Perez-Blanco, and it's dated February 26, 1991.

Doctor, can you tell us, first of all, why there were two pathology reports for the tissue removed from Mr. Kueper's lungs during the bronchoscopy.

A Slightly different procedures.

Q What do you mean by that?

A Well, he has specimens taken with a needle passed through the bronchus, I believe -- yes, and others were biopsies taken with forceps of the bronchus itself and of lung tissue.

Q So, if I understand you correctly, Dr. Dilley used different procedures for removing tissue during the bronchoscopy from Mr. Kueper?

A That's correct.

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Q Now, referring to Defendant's Exhibit No. 4, which is Dr. Malcolm's pathology report, you'll note on the second page under the "Comments" section, Dr. Goodwin notes: "No malignancy is found in this material."

Have I read that correctly?

A Yes, you have.

Q And that means that there was no cancer cells observed there?

A That's right.

Q That's the first one, the needle?

A Yes.

Q Now, the second pathology report from this tissue -- and this would be the report reflecting microscopic examination of the biopsy specimens?

A Yes.

Q Okay. And that's Defendant's Exhibit 5. And, I note here on this report, which was generated by Dr. Perez-Blanco, that for the microscopic diagnosis, we again see, "No evidence of malignancy," and, again, on the second page, "No evidence of malignancy," for the second biopsy specimen there.

Have I read that correctly?

A Yes, sir.

Q So, that means there was no cancer found in the

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biopsy specimens either?

A That's right.

Q So, if I understand correctly, with respect to the first bronchoscopy procedure done on Mr. Kueper by Dr. Dilley at Scott Air Force Base, there was no cancer visible during the procedure, and no cancer found in the tissue that was taken from his lungs during the procedure; is that correct?

A That's correct.

Q Now, before the bronchoscopy was performed, a sputum sample was taken from Mr. Kueper; is that correct?

A I --

Q You're not aware of that?

A Not aware of that.

Q (Pause) I will try to behave better.

Let me show you a copy of a pathology report under the letterhead of Metropolitan Reference Laboratories.

Are you familiar with Metropolitan Reference Laboratories?

A No, I'm not.

Q Are you familiar with the procedure for obtaining sputum samples?

A Yes.

Q Have you obtained sputum samples from your patients?

A Yes.

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Q Can you tell us briefly, and in layman's terms, how a sputum sample is obtained?

A Give the patient a cup and ask them to spit in it.

Q What's the purpose of obtaining a sputum sample?

A Well, in the context of suspected cancer, it's to obtain cells to examine under a microscope to make a diagnosis.

In the context of infection, you're looking for organisms causing that infection.

Q Would you take a look at the second page of the document that I just showed you, and why don't we mark this one for identification as Defendant's Exhibit -- what's the next in order? Do we know? We had marked a number previously. For safety's sake, let's mark it Defendant's Exhibit 20.

Doctor, looking at the second page of Defendant's Exhibit 20, it appears to say, "Negative for malignant cells." Do you see that?

A Yes.

Q And does that mean that there was no cancer found in the sputum sample?

A Yes, sir.

Q And, just so we're clear, is this a report of an analysis done on a sputum sample obtained from Mr. Kueper?

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A Yes, sir.

Q Now, if I understand your direct testimony, when Mr. Kueper came to see you in August of 1991, you performed your own bronchoscopy; is that correct?

A That's correct.

Q And, during that bronchoscopy, you found no observable abnormality anywhere in his tracheobronchial tree?

A That's correct.

Q And, you did not see any narrowing of the bronchus at that time from external pressure?

A No.

Q So, there was nothing suggesting during that bronchoscopy that there was cancer either inside the bronchus or outside the bronchus pushing in?

A Correct.

Q And, you didn't take any tissue samples for examination during that procedure?

A No.

Q And, you didn't do that because you didn't see any point in it; is that right?

A That's right.

Q Now, in February of 1992, February of this year, you did another bronchoscopy on Mr. Kueper; is that correct?

A Yes, sir.

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Q I want to show you the, a bronchoscopy report, and ask you if this report reflects the bronchoscopy that you did on Mr. Kueper in February of 1992?

A Yes, sir.

Q And is that your signature at the bottom righthand corner?

A It is.

Q And, during this procedure, you again saw normal airways; is that right?

A Yes.

Q And, that finding is reflected in the "Findings" section of your bronchoscopy report; is that correct?

A Yes, sir.

Q My colleague here has reminded me that this report has been previously identified as Defendant's Exhibit No. 6, which I'll mention for the record.

Now, during this procedure, as during your earlier procedure, you not only saw nothing abnormal internally, but you saw no external pressure on the bronchus?

A That's correct.

Q Now, while you did not take any tissue during your initial bronchoscopy in August, you did take tissue during this bronchoscopy; is that correct?

A I don't recall. We have --

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Q Well, let me show you a pathology report, and see if that refreshes your recollection.

A Yes. Okay.

Q The pathology report was previously marked for identification as Defendant's Exhibit No. 8.

Doctor, now that you've had a chance to review Defendant's Exhibit 8, does that refresh your recollection that you did, in fact, take tissue from Mr. Kueper during the February, 1992 bronchoscopy?

A Well, I wouldn't call it tissue. What I did was wash that upper lobe, the right upper lobe here, to collect any cells that might be there. That's tissue.

It's not like a biopsy. It's not as abundant material as a biopsy. It's somewhat similar to sputum.

Q You took a specimen of four and a half cc's of cloudy fluid from Mr. Kueper during that procedure?

A I injected the fluid, so it was just water, and then it mixed in the lung, aspirated it back, became cloudy with cells from the lung.

It wasn't as if there were four cc's of lung fluid that I took. Most of the fluid I introduced was just water.

Q And, then you took it back?

A Then I took it back.

Q And, the purpose of that procedure is to determine

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if there are any cancer cells in the lungs?

A That's correct.

Q And, after you removed the fluid with the cells mixed in with it, you sent it to a pathologist for microscopic examination?

A Yes, sir.

Q And, Defendant's Exhibit 8 reflects the results of that pathological review of the material that you removed from Mr. Kueper?

A Yes, sir.

Q And, the report reflects that that examination showed that it was negative for malignancy?

A That's correct.

Q No cancer again?

A Yes.

Q Now, if I understand correctly, Mr. Kueper has had three separate bronchoscopies; is that correct?

A That's correct.

Q One performed by Dr. Dilley at Scott, and two which you performed?

A Yes.

Q And, during none of those three bronchoscopies, was any cancer observed within his lungs?

A That's correct.

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Q And, during two of those procedures, tissue or specimens were removed for microscopic examination?

A Yes.

Q And, microscopic examination of all the tissue that was removed from Mr. Kueper's lungs was negative for cancer?

A Yes. I think it's important to point out that my bronchoscopies were --

Q Doctor --

A -- after treatment.

Q Doctor --

MR. COOK: Go ahead, Doctor. You finish your answer.

MR. STUHAN: There's no question pending here.

MR. COOK: Doctor, go ahead with your answer.

MR. STUHAN: Bruce, when you're conducting your examination --

MR. COOK: I understand, and you can make your objection any time you like.

MR. STUHAN: I have.

MR. COOK: You can't tell him what to do, and so you may finish, Doctor.

THE WITNESS: There's an important difference. My procedures were done after treatment with radiation, the goal of which is to find no cancer cells after that --

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BY MR. STUHAN:

Q So --

A -- if it's been successful.

Q That's fine, Doctor.

A Okay.

Q Now, the only place that cancer has ever been found, identified in Mr. Kueper, is in the mediastinum; is that right?

A Tissue-wise, yes. The reports that I had were that there was a mass or tumor around his bronchus intermedius, which is this area here, in addition to mediastinal lymph node abnormalities, which is in here.

That has not been sampled, so I can't say that that's cancer, but radiographically, to those that read those films, it appeared to be cancer.

Q Well, you would agree with me, Doctor, that the diagnostic capabilities of x-rays are limited?

A Yes.

Q You can determine on the basis of x-rays that there is an abnormality; is that correct?

A That's correct.

Q But, you need tissue to make a definitive diagnosis?

A Generally, yes, to make a pathologic diagnosis.

Q And, in the tissue that was removed from Mr.

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Kueper's lungs, the tissue was negative for malignancy?

A Yes.

Q And, the only place that there was a positive hit, if you will, on tissue, was in the mediastinum, that area between the chest --

A That's correct.

Q -- or between the lungs?

A That's correct.

Q Doctor, would it be fair to say that cancer can originate in the mediastinum?

A Yes.

Q Has cigarette smoking, to your knowledge, ever been associated with cancer that originates in the mediastinum?

A Not to my knowledge.

Q Now, in addition to originating in the mediastinum, cancer can spread there from another site; is that accurate?

A That's accurate.

Q And that process of spread is known by physicians as metastasis?

A That's correct.

Q And, cancer can metastasize to the mediastinum from the lungs?

A Correct.

Q But, it can also metastasize to the mediastinum from

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other sites; is that correct?

A Correct.

Q What are some of the other sites from which cancer can metastasize to the mediastinum?

A The stomach, esophagus. Generally, if it metastasizes there from other areas of the body, it generally does that through the lungs. (Pause)

First to the lung, and then to the mediastinum. Breast, in a female. It's not likely in a male.

Q How about from the head and neck area?

A Yes.

Q From the pancreas?

A Yes.

Q From the liver?

A Yes.

Q From the ovaries in a woman?

A Yes.

Q From the prostate in a man?

A Yes.

Q Okay. Doctor, in response to Mr. Cook's questions, you expressed the opinion that Mr. Kueper's cancer was caused by cigarette smoking.

Did you ever express that opinion to Mr. Kueper on any of the occasions when he came to visit you for treatment?

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A I don't recall discussing with him what caused it. I may have. I don't recall.

Q You don't have any clear recollection of --

A No.

Q -- discussing that subject with him?

A No.

Q Was it necessary for you as part of your treatment of Mr. Kueper to form an opinion as to what caused his cancer?

A No.

Q Would your treatment of Mr. Kueper have been any different if you had concluded that his cancer was caused by radiation or asbestos exposure or toxic chemicals in the workplace?

A No.

Q You would have treated him exactly the same way regardless of what caused his cancer?

A That's correct.

Q At what point in your treatment of Mr. Kueper did you conclude that his cancer was caused by cigarette smoking?

A Probably the first time I saw him.

Q Isn't it true, Doctor, that you never made any serious effort to determine whether Mr. Kueper's cancer could have been caused by any factor other than cigarette smoking?

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A It's true that I did not take a detailed work history. It's my opinion, such as it is, that if you smoke cigarettes and have lung cancer, it's irrelevant whatever else you do; it's a contributing factor.

Q And, you never made any effort to determine whether there might have been any other factors which contributed to Mr. Kueper's cancer?

A We discussed his past history to some extent. I don't recall in what detail. You know, that he was a truck driver -- (Pause) and had been in Vietnam, things like that, but we did not in detail discuss anything that he was exposed to in the workplace, no.

Q Doctor, would you agree that occupational exposures are now recognized as an important cause of lung cancer?

A Yes.

Q Would you agree that occupational exposures are thought, at least by some authorities, to account for as much as 20 percent of lung cancer?

A No, I wasn't.

Q Doctor, when we took your deposition, we had asked you some questions about various sources on which you relied in the course of your practice, and I believe that you mentioned, among others, Fraser and Pare'; is that correct?

A Yes. That's a textbook of pulmonary medicine that I

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have used on occasion.

Q Do you consider Fraser and Pare' authoritative on pulmonary medicine?

A I consider it an excellent textbook, but I don't consider any source as authoritative.

Q No source that you can think of which serves as the repository of ultimate wisdom, immutable principles?

A God.

Q Other than God, no source that you would call authoritative?

A That's it; no.

Q Would you agree that Fraser and Pare' is a reputable and reliable source?

A Reputable and reliable, yes.

Q Let me have Fraser and Pare'.

Doctor, I'm going to show you Fraser and Pare', and ask you to look at page 1333.

A 1333?

Q Right.

MR. COOK: May I see it first, Doctor?

THE WITNESS: May I ask what you'll do with these books when this is over?

MR. COOK: They keep them.

MR. STUHAN: Are you trying to steal my books?

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THE WITNESS: Yeah. That's a good book. They get very expensive. (Pause) Okay.

BY MR. STUHAN:

Q Now, Doctor, if you would look in the righthand column, about the middle of the page, there's a paragraph beginning with "Doll and Peto."

Do you see that?

A Yes.

MR. COOK: What page are you on?

MR. STUHAN: Page 1333.

(Pause)

BY MR. STUHAN:

Q Okay. Have you found that?

A Yes.

Q Okay. And it says:

"Doll and Peto have estimated the overall incidence of occupation-induced cancer in the United States to be four percent. In the Canadian province of Ontario, this figure was placed at less than one percent.

"However, for cancer of the lungs specifically, the proportion caused by occupational carcinogens is undoubtedly much higher, perhaps as much as 10 to 20 percent."

Do you have any reason to take issue with that estimate?

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A Twenty percent is higher than I've seen in my experience. That's why I don't consider this authoritative. I'm not sure I would agree with 20 percent. I just don't see that.

He doesn't say here how many of these people also smoke, so, it's rather meaningless in my opinion.

Q So, your own experience is not consistent with Fraser and Pare'?

A That's correct.

Q And you would disagree with their estimate?

A I would disagree with 20 percent.

Q What would your estimate be?

A Probably -- it depends where you are, actually, what population you're dealing with, what type of workers, you know.

In my practice, I don't have people exposed to carcinogens; they're businessmen and so forth. So, if you have a bunch of smoking miners, then it would be considerably higher.

Q Doctor, would you flip back to page 1331?

MR. COOK: May I see the book, Doctor. (Pause)

Fine, Doctor. Thank you. My copy, you left part of mine off. I don't understand why you would leave part of a page off, what you're referring to, and I object to

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that.

MR. STUHAN: I did it in my own copy, too, but you're welcome to read over Dr. Best's shoulder if you like.

BY MR. STUHAN:

Q "The incidence of lung cancer has been increasing in non-smokers also, suggesting that factors other than this agent may be assuming greater significance.

"Especially important in this regard are a variety of particulate and chemical substances inhaled in occupational and other settings."

Do you disagree with that?

A No.

Q So, if I understand your testimony, you agree that occupational exposures are a causative factor of lung cancer, and your disagreement is with what percentage of lung cancer occupational exposures account for?

A That's correct. As well as what one's smoking history is in association with those occupational exposures.

Q Okay.

A How are you going to differentiate? I don't know the answer to that.

Q Well, Fraser and Pare', in the passage we just read, talked about factors in addition to cigarette smoking, didn't they?

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A Yes.

Q Doctor, I'd like to show you now a page of handwritten notes. We'll mark it for identification as Defendant's Exhibit 21. (Pause)

I have a blowup of this exhibit here as well. (Pause)

And, my question to you is whether Defendant's Exhibit 21 are notes which you made.

A Yes, they are.

Q And, were these the notes that you made on the occasion of Mr. Kueper's first visit to you in August of 1991?

A Yes, it is.

Q And, are these all the notes that you made during that first visit?

A Yes.

Q Now, if you look toward the bottom of the page here, you have a notation, "Work, 18-wheeler." Is that a reference to Mr. Kueper's occupation as a truck driver?

A Yes.

Q That's what you mean by "18-wheeler?"

A Correct.

Q Doctor, is it not the case that the mere fact that Mr. Kueper was a truck driver increased statistically his

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odds of developing lung cancer?

A Only if he was a smoking truck driver.

Q Would you take a look at Fraser and Pare', page 1333? (Pause)

Now, if you look on the lefthand column, toward the bottom of that first long paragraph on that page, about 15 lines up, there's a sentence that begins, "Workers who appear to be at greater risk for cancer of the lung include --"

Have you found that?

A Yes.

Q And, if you go down from that about six lines, it says, "Bus and truck drivers?"

A Uh huh.

Q Now, do you see anything in there that suggests that bus and truck drivers are at greater risk for lung cancer only if they're smokers?

A No, but I think truck drivers as a whole tend to be a population that are heavy smokers, as a rule.

Q What's your basis for that testimony, Doctor?

A Just looking in their windows driving down the highway, most of them smoke.

Q I see. Doctor, is the fact that Mr. Kueper is a truck driver the only detail that you recorded in your notes about his occupation when he came to see you in August of

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1991?

A (Pause) I mention "Pipe yard," and I don't recall what that refers to.

Q So, pipe yard may have had something to do with his work history?

A Yes, possibly.

Q Other than his driving an 18-wheeler and pipe yard, you recorded no other details of his occupational history?

A No, I didn't.

Q Were you aware, Doctor, that Mr. Kueper's responsibilities as a truck driver included adjusting the brakes on his truck?

A No. No.

Q Are you aware that asbestos is widely used on brake linings?

A I am.

Q Are you aware of medical literature linking asbestos with lung cancer?

A Yes.

Q Did you make any inquiry during this initial visit of Mr. Kueper about what kinds of materials Mr. Kueper hauled in his truck?

A No.

Q Did you know that he worked for a chemical company?

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A No, I don't know what chemicals he handled.

Q You never asked him about the kinds of chemicals that he handled?

A No.

Q Doctor, do you know what a material safety data sheet is?

A A material safety what?

Q Data sheet.

A Vague idea.

Q What is your idea about what an MSDS is?

A Maximal safe does, something, probably.

THE COURT: I've got a phone call due at three-thirty, I think, so we'll break for a few seconds. Five minutes then. Let's try to make the call.

(Whereupon, a short recess was taken, and the following proceedings were had in chambers, outside the presence and hearing of the Jury.)

MR. CRIST: Have you got it? I am going to try to put you on the speaker phone right now. Sharon?

MS. JOHE: Yes.

MR. CRIST: Are you there?

MS. JOHE: I am here.

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MR. CRIST: Am I going to hang this up, Judge?

THE COURT: Yes, hang it up.

MR. CRIST: Sharon Johe is a lawyer in the law department of Reynolds in Winston-Salem, North Carolina.

THE COURT: Okay. Pat, are we set up with the other mike?

THE REPORTER: Yes.

MR. CRIST: Do you have a transcript, Judge?

THE COURT: Hang on -- let me --

MR. CRIST: This is the transcript. I think it reads something like, "We are the guys that have scientific truth and integrity on behalf, or on the side of the people, who would, but put political agenda aside for a second," --

THE COURT: Okay.

MR. CRIST: Something like that.

MS. JOHE: All right. Do you want to hear it? We will cue it up.

(TAPE: We are the guys that have scientific truth and integrity on the side of . . . .)

MR. COOK: Play it one more time.

MS. JOHE: Okay. Do you need it replayed?

MR. CRIST: Yes, play it back, Sharon.

MS. JOHE: Okay.

(TAPE: I think we are the guys that have scientific

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truth and integrity on our side of people, but -- putting political agenda aside, putting that aside for a second --")

MS. JOHE: Do you want to hear it again?

MR. COOK: One more time.

THE COURT: One more time for Bruce.

MR. CRIST: Okay. One more time.

MS. JOHE: Okay. One more time. You got it cued up?

(TAPE: I think we are the guys that have scientific . . . and integrity on the side of the people, but putting political agenda aside, putting that aside for a second.)

MR. COOK: Okay.

THE COURT: Okay.

MR. COOK: That is what it says.

THE COURT: That is what he says.

MR. CRIST: Okay, Sharon, thanks a lot. Goodby.

(Discussion off the record.)

THE COURT: Let's do it again.

MR. CRIST: Is Sharon Johe there, please? (Pause) We got you back on the speaker phone. Can we have it once more.

MS. JOHE: We will have to put the tape back in. Just a second.

MR. COOK: I think it is clear he said integrity, but

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that, when I heard it, I heard it that way.

MR. STUHAN: You heard what you saw. It is natural to do that.

(TAPE: . . . "I think we are the good guys. We are the guys that have scientific truth and integrity on our side of people -- but putting that aside for a second."

MR. CRIST: Play it again.

(TAPE: We are the guys that have scientific truth and integrity on the side of the people, but putting that aside for a second.)

MR. CRIST: Do it again, if you can.

(TAPE: I think we are the guys that have scientific truth and integrity on the side of the people, but putting that aside for a second."

(TAPE: We are the guys that have scientific truth and integrity on the side of the people, but putting political agenda aside for a second."

MR. HEPLER: But would --

MR. COOK: I don't hear that. Do it once more.

MS. JOHE: Hold on one second. We have to re-cue it.

(TAPE: Why don't you folks play the good guys now. I think we are the good guys. We are the guys that have scientific truth and integrity on the side of

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people, but putting political agenda aside, putting that aside for a second."

MR. STUHAN: Do it again, J.D.

MS. JOHE: Let him re-cue it a second.

(TAPE: I think we are the good guys. We are the guys that have scientific truth and integrity on our side, but putting --"

MR. COOK: I don't hear any "but would."

THE COURT: Last time.

(TAPE: We are the guys that have scientific truth and integrity on our side of people, but putting political agenda, putting that aside for a second."

MR. CRIST: Okay. Thanks very much.

MR. COOK: Can you have them send that portion of it.

MR. CRIST: Can we type it up and fax it here?

THE COURT: Do you think it is critical to delay the trial a day?

MR. COOK: I don't think it will delay the trial a day.

THE COURT: It will delay ending your case.

MR. COOK: How will you end my case, when we have an hour and 25 minutes of tape to go.

THE COURT: Short cross examination was the way I was figuring.

MR. COOK: An hour and a half from now is five o'clock.

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THE COURT: Well, I don't know if they can get this tape here or not.

MR. COOK: They can send it overnight mail.

THE COURT: If you are making a 230 -- if you are making a demand on them to produce it, they can either produce it or object to it.

MR. COOK: You say, "We are the guys that have scientific truth and integrity --"

MR. HEPLER: "On our side" runs together.

MR. COOK: "If people would but put political agenda aside for a second."

MR. HEPLER: That would put.

MR. COOK: We are the guys that have scientific truth and integrity on our side --

MR. CRIST: If people would put --

MR. COOK: Scientific truth and integrity --

MR. HEPLER: On our side.

MR. COOK: On our side.

MR. HEPLER: If people.

MR. COOK: That is the only part I am concerned about anyway.

MR. HEPLER: If people would put.

MR. COOK: I am going to read his admission, "We are the guys that have scientific truth and integrity on our side."

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I assume that is what the Judge is pointing out. That is the only reason to read it to begin with. You know, after we get through all this, it really doesn't say much different than the first sentence I read to begin with.

MR. CRIST: But it isn't impeaching of him, which you are doing.

MR. COOK: But I didn't expect to impeach him. I expected him to admit that it said that.

MR. HEPLER: But, he was saying -- he was obviously right --

MR. COOK: And as a practical matter, it really -- it says about the same thing.

MR. HEPLER: But to his credit --

THE COURT: Okay, we are done on the record.

(Whereupon, the following proceedings were had in the courtroom, in the presence and hearing of the Jury.)

THE COURT: Okay. Let's turn it back on. Everybody is here.

(Whereupon, the videotape deposition of Dr. Best, with Mr. Stuhan cross examining, continued.)

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Q Did you know that he worked for a chemical company?

A No, I don't know what chemicals he handled.

Q You never asked him about the kinds of chemicals that he handled?

A No.

Q Doctor, do you know what a material safety data sheet is?

A A material safety what?

Q Data sheet.

A Vague idea.

Q What's your idea about what an MSDS is?

A Maximal safe dose, something, probably.

Q No, I'm just using that as an acronym for material safety data sheet. My question is, do you understand what they are?

A Why don't you educate me.

Q Well, sure. Why don't I show you a collection of them. (Pause) Let me mark this for identification as Defendant's Exhibit 22.

Doctor, that's one of a number of material safety data sheets we obtained from Vertex Chemical Corporation, Mr. Kueper's employer.

And, I take it from your testimony that Mr. Kueper never shared this or any other of the material safety data

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sheets from Vertex with you?

A No.

Q And, from that I assume that you weren't aware that at Vertex he was exposed to a variety of carcinogens at work, including formaldehyde, crystalline silica, diesel fuel, and reagent alcohol.

The question is: were you aware of that?

A No.

Q Were you aware that Mr. Kueper had received material safety data sheets indicating that he was exposed to chemicals which are known lung irritants?

A No.

Q Were you aware that in July of 1986 that Mr. Kueper had sustained a chemical burn at work on his right upper arm and on the right portion of his chest?

A No.

Q Were you aware that Mr. Kueper had had another industrial accident in August of 1987?

A No.

Q Were you aware that at that time that a chemical tank holding chlorine liquid had burst while Mr. Kueper was filling it from his truck, and that the chlorine splashed into Mr. Kueper's face?

A No.

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Q Did you ask Mr. Kueper about any of the jobs that he had held prior to going to work for Vertex as a truck driver?

A No.

Q Now, you have pipe yard down on there, and there's been some testimony in this case that Mr. Kueper had previously worked for an outfit called Fluor Pipe & Piling.

Does that refresh your recollection as to what pipe yard meant?

A No, I don't recall that.

Q Well, did you know that when he worked for the pipe yard, that one of Mr. Kueper's jobs was to cut pipe with an acetylene torch?

A No, and it doesn't matter to me what he did in all those jobs. It doesn't change any of this.

Q That's what we're trying to establish here. Did you know that when he worked for Fluor, that one of his jobs was to do sandblasting?

A Huh uh.

Q Did you know that Mr. Kueper was a trained welder?

A No. I've already said I didn't know anything, any jobs he did or anything else, so it's pointless to just keep repeating all these things. I don't know about any of this.

Q Now, I think you testified a few moments ago that you had had some discussions with Mr. Kueper about his

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military experiences; is that right?

A He mentioned that he was a Vietnam veteran.

Q Is there any mention of Mr. Kueper's military experiences in your notes?

A I don't believe so.

Q Did you know that Mr. Kueper had served three tours of duty in southeast Asia?

A Yes.

Q Did you know he was a member of the Green Berets, the special forces?

A Yes.

Q Did you know what kind of work he did as a member of the special forces?

A No.

Q Did you ever discuss with him whether he had been exposed to Agent Orange while in Vietnam or in southeast Asia generally?

A I don't recall for sure. I think I did ask him if he was in any areas where it was used.

Q Why would you have asked him that question?

A Just out of curiosity, I guess.

Q Why were you curious about that?

A Lots of talk about Agent Orange and whether it's causing any health effects in our veterans.

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Q Have you made any study of the effects of Agent Orange yourself?

A No.

Q So, even if Mr. Kueper had told you that he had been exposed to Agent Orange, you wouldn't have known what to make of that information?

A Correct.

Q Doctor, do you know enough about Agent Orange exposure to know that there is a latency period after exposure before any problems associated with Agent Orange exposure occur?

A No.

Q Does cancer generally have a latency period after exposure to the carcinogenic agent?

A Yes.

Q And, generally what is that latency period?

A Generally several years.

Q It could be as long as 20 or 25 years?

A Yes.

Q You don't know what the latency period is with Agent Orange?

A No. Latency for what?

Q For cancer.

A I didn't know it caused cancer.

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Q You have on your notes of that first office visit, "Past OK." That's right above where you've recorded the work history.

A Uh huh.

Q Does that mean that you found Mr. Kueper's past medical history to be noncontributory?

A Yes.

Q What do you recall Mr. Kueper telling you about his past medical history?

A I don't recall any specifics about that discussion.

Q Do you recall --

A It generally means he doesn't have diabetes or heart disease or high blood pressure or heart attacks, that sort of thing, other active medical problems.

Q Do you recall Mr. Kueper ever telling you that he had been treated by physicians for various skin infections over 20 times?

A No.

Q You never heard that until today?

A Not that I recall.

Q Doctor, I'm going to hand you a document which I'll mark for identification as Defendant's Exhibit 23. This was a document previously marked during the deposition of Mrs. Kueper as Exhibit 7 to her deposition.

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Let's see if that refreshes your recollection about hearing about any problems with skin infections Mr. Kueper might have had.

MR. COOK: How could it refresh his recollection?

THE WITNESS: I want to clarify this a bit. He came to me with a diagnosis of lung cancer with some respiratory complaints, so this was not an all-encompassing kind of a general history and physical, "What has your health been your whole life," sort of exam.

It was more directed toward his chest complaint, and was there anything I could do to help that.

I don't recall any of these things, no.

BY MR. STUHAN:

Q Okay. Let's make sure that we're on the same wavelength here.

When I ask you questions about whether he had told you anything about a history of skin infections, I didn't mean to limit myself to this first visit.

Did he ever tell you anything about skin infections?

A No.

Q And we had gone through a series of questions about various occupational exposures, and I had asked you whether Mr. Kueper had ever shared any of that information with you, and you said no. Now, let's make sure we understand here.

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I don't want to limit myself again to this first visit, but at any point in the course of your dealings with Mr. Kueper, did you ever obtain any information about the various occupational exposures I just asked you about?

A No.

Q Now, getting back to the skin infections here, now that you've seen Defendant's Exhibit 23, is it possible that a history such as this, of skin infections, could reflect an underlying immunological problem?

A It could. I just glanced at that. A lot of those infections you're talking about, half of us in this room have had those things. They're very common, day-to-day kind of things.

Tinea, you know, athlete's foot, a boil, you know, nothing too exciting there. I didn't have a chance to look at it in great detail, but --

Q Well, Doctor, is it common for people to have those kinds of skin infections so severely that they require a visit to a physician over 20 times?

A (Pause) Sometimes.

Q Doctor, how many of your patients have had skin infections that required visits to a physician for treatment over 20 times?

A Not many. I mean, that's 20 times over what? 20

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years? Yeah. So, an average of once a year.

But some of these he had -- you know, human bite, you can't help that. Infected cyst on his neck; I've had numerous times. I just don't go to the doctor with that sort of thing. Groin rash, folliculitis; these are just hair follicle infections.

(Pause) It could be poor hygiene.

Q Could be poor hygiene, or it could reflect an underlying immunological problem?

A Could.

Q You couldn't rule that out?

A Couldn't rule that out.

Q Is it possible that an immune system compromise could have contributed to Mr. Kueper's cancer?

A I don't think so.

Q Would you pull out Fraser and Pare' again and take a look at page 1331? (Pause)

That first paragraph there, toward the bottom of the paragraph, sentence beginning with "Finally." It says:

"Finally, although the mechanisms are not yet fully understood, circumstantial evidence indicates major roles in etiology for genetic susceptibility and immunologic status."

Have you found that?

A No, I'm sorry. Where are you now?

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Q Page 1331.

A The bottom paragraph?

Q No, it's in the paragraph that we looked at before. The bottom part of that paragraph.

A I didn't even find that one. (Pause) Middle of the page?

Q (Pause) First paragraph on the page.

A Okay.

Q Bottom of that paragraph.

A Okay.

(Pause)

Q Now, Fraser and Pare' talk about a possibly major role in etiology, and etiology means causation; is that right?

A That's right.

Q They talk about a possibly major role in etiology for genetic susceptibility and immunologic status. You don't disagree with that, do you?

A No.

Q We've been talking about Mr. Kueper's past medical history, and we've been talking about the skin infections. Let me move on to another part of his history.

Did Mr. Kueper ever tell you that while he was in Vietnam back in the '60s that he had developed right-sided

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pain?

A No.

Q Did he ever tell you that when he returned stateside from southeast Asia that he had had recurrence of that pain?

A No.

Q Did he ever tell you that doctors at that time had done a laboratory workup and that the test was positive for the parasite Ascaris --

A Ascaris.

Q -- lumbricoides?

A Lumbricoides.

Q I take it you know about that?

A I remember it from my biology days.

Q Okay. What do you know about the Ascaris parasite?

A As I recall, I think it burrows through the skin and gets in the GI tract, and it burrows up at night and goes down your nose into your lungs, but I may have the wrong parasite. Is that it?

Q Yeah, that's the same one.

Did you know that it was discussed in Fishman's Textbook on Pulmonary Diseases and Disorders?

A I wouldn't doubt it.

Q Do you know that when it gets to the lungs, it can cause a pneumonia-like condition?

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A Yes.

Q Did you ever consider the possibility that Mr. Kueper's infection with the Ascaris parasite could have caused scarring in his lungs?

A No, I certainly didn't.

Q (Pause) We've been focusing on Mr. Kueper's specific case here, and I'd like to get a little more general here with you with respect to the question of causation.

Do you agree that the biological mechanism by which cancer occurs is not yet fully understood by medical science?

A The biological mechanism you said?

Q That's right.

A I would say that's probably true, yes.

Q We don't yet know what causes a cell to become malignant?

A On a molecular basis or what-have-you, that's probably true.

Q Would you also agree that even those persons, like yourself, who believe that smoking is a cause of lung cancer, haven't yet identified the biologic mechanism by which that occurs?

A That's correct. This is epidemiologic data.

Q And, the case linking smoking with lung cancer is principally epidemiologic, isn't it?

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A That's correct.

Q Would you agree with me, Doctor, that smoking is neither a sufficient, nor a necessary cause of lung cancer?

A It's not sufficient?

Q Not a sufficient, nor a necessary cause of lung cancer.

A You're saying that there are potentially other causes besides smoking, or you're saying that it's not sufficient to cause it at all?

Q Well, let's break it down. Let's talk a little bit about sufficiency first. Not all smokers get lung cancer, do they?

A That's correct.

Q In fact, not even all heavy smokers get lung cancer?

A That's true.

Q Would you agree that only a small fraction of cigarette smokers get lung cancer?

A I really can't say what percentage of smokers do get lung cancer. It's not the majority; I'll give you that.

Q Would it surprise you to learn that less than ten percent of all cigarette smokers get lung cancer?

A No.

Q That wouldn't surprise you?

A No.

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Q So, when you say that it's less than a majority, you agree that it's less than ten percent?

A I would not disagree with that. I don't know what the figure is, actually.

Another way to look at that is it increases the risk of lung cancer four to ten times, so there's all sorts of ways to look at the statistics.

(Pause)

Q This is a little bigger than I hoped it would be originally, but we'll do our best with this one here. I'll see if we can prop it up.

A (Pause) I'll hold it.

Q Dr. Hoover from the National Cancer Institute, writing in Epidemiology -- and you would agree with me, wouldn't you, that the National Cancer Institute is a reliable source of information on lung cancer?

A Yes.

Q Now, Dr. Hoover says that, "Since the vast majority of smokers, even heavy smokers, do not develop lung cancer, it is clear that a number of other variables are involved in the carcinogenic process."

Moving down to Dr. Burrascano here, who is listed as a former chief of pulmonary physiology at Seaview Hospital in Staten Island, he says:

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"Moreover, among the 50 million smokers in the United States, approximately 25 percent, or 12.5 million, may be called heavy smokers, yet only 60,000, 70,000 or one-half of one percent contract lung cancer each year.

"Realizing that these cancer patients have been smoking for 15 to 20 years, the overall incidence of cancer in heavy smokers may approach only about ten percent."

Finally, we have -- Dr. Herrold says: "Extremely important from a biologic standpoint is that only a small percentage of heavy cigarette smokers developed lung cancer in the Dorn study."

Are you familiar with the Dorn study of U.S. veterans?

A I've heard of it. I'm not familiar with it in any detail.

Q You know it's a well-conducted, well-controlled epidemiologic study; is that right?

A Yes, sir.

Q And, Dr. Herrold says, in the Dorn study, "Only 9.9 percent of the heavy smokers," which he defines as one or more packs of cigarettes per day, "had lung cancer. 90.1 percent, who were heavy smokers, did not develop lung cancer, but died from other causes."

Okay. Now, my question to you is, do you have any

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basis for disputing the figures that less than ten percent of even heavy smokers develop lung cancer?

A I personally don't. This is 1970's data, though. Is there anything more recent? That's 20 years old.

Q Do you have any reason to think that the numbers are any different today?

A No. I mean, I think in medical science, you like to look at the latest data any time.

Q Are you familiar with any more recent data --

A No, I'm not.

Q -- that would suggest that any more than ten percent of even heavy smokers developed lung cancer?

A No.

Q Doctor, we talked a little bit before about other factors which have been linked with cancer, and there are factors other than cigarette smoking which have been identified as risk factors for lung cancer. You would agree with that?

A I would agree with that.

Q Radiation, for example?

A Yes.

Q Okay. Now, Doctor, I'd like you to assume that Mr. Kueper had been exposed to multiple risk factors for lung cancer. Can you make that assumption for me?

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A Okay, assumption.

Q It's a hypothetical question.

A Okay.

Q Let's assume that he was exposed to smoking, to occupational chemicals, and to radiation.

A Okay.

Q Now, making that assumption, is there any way to determine by looking at x-rays, by microscopically examining the tissue that was taken from the mediastinal lymph nodes, is there any way to determine which of those exposures would have caused his lung cancer?

A No.

Q Now, if you've watched old crime shows, as I have, you probably have seen programs in which the coroner comes in and talks about how the murder was caused by a blunt instrument, or a sharp object, and I assume those determinations are made on the basis of some markers that the pathologist sees in the corpus delicti.

Are there any markers in cancer that would permit a pathologist or another physician to determine what caused that cancer?

A Well, I'm not a pathologist, but there are certain tissue types of lung cancer, and they tell us that they started in the lung rather than coming from other organs, and

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epidemiologic studies show that the incidence is increased in smokers for those cancers. So, I guess the cell type might help.

Q I'm looking for physical evidence within the cancer itself, which points to the cause of that cancer.

A No.

Q There is no such marker?

A That's correct.

Q Doctor, before we broke, we were talking about our hypothetical patient with multiple exposures, and I had asked you some questions about the physical markers in the cancer, and you told me about that.

Now, just to conclude that line of questions, is it the case that in a person with multiple exposures to carcinogens, that there is no scientific way to determine the relative contribution of each of those exposures to the cancer?

A That's correct.

Q I probably should have begun this part of the examination with these questions about your background in cancer causation, but since I didn't, let me do that now.

Now, there's a special discipline in medicine which deals with cancer; is that right?

A Yes.

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Q And that discipline is oncology?

A Correct.

Q And, a physician can obtain board certification in that discipline, the discipline of oncology; is that right?

A That's right.

Q And, you're not an oncologist?

A No.

Q And, you're certainly not a board-certified oncologist?

A No.

Q Since you graduated from medical school, have you done any research regarding the causes of cancer?

A No.

Q Have you done any research regarding the relationship between tobacco smoking and lung cancer?

A No.

Q You've never written a book or a journal article on the causes of lung cancer; have you?

A No.

Q And, you've never written a book or journal article on the relationship between smoking and lung cancer; have you?

A No, I haven't.

Q And, you've never made any presentations, for

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example, at a scientific seminar or symposium on the causes of lung cancer?

A No.

Q And, you've never made any presentation at a seminar or conference on the relationship between smoking and lung cancer.

A No.

Q Now, you mentioned before, and testified, that the principal evidence linking smoking with lung cancer is epidemiologic evidence; is that right?

A That's right.

Q And, you're not an epidemiologist either, are you?

A No.

Q Doctor, could you identify for us the sources that you rely upon for your opinion expressed here today that smoking is a cause of lung cancer?

A Various textbooks, journal articles, lectures by senior physicians, the warning on the cigarette pack. I mean, it's everywhere.

Q Can you identify any specific books or journal articles that you rely on for your opinion?

A Fraser-Pare' discusses the relationship of smoking with lung cancer. I've never seen a textbook of pulmonary medicine that doesn't do that.

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I've never seen an article that deals with lung cancer that doesn't mention smoking as the number one cause.

Q Well, the question that I have for you is whether there are any particular articles that come to mind, and which you rely upon, for the opinion that you've expressed?

A No. No.

Q Now, when you suggest, as you have here, that you've read articles associating smoking with lung cancer, are those articles reporting on epidemiologic studies?

A Some are.

Q What are the others?

A Just deal with the diagnosis and treatment of lung cancer. Many times it will discuss causes of in the beginning of those articles under generalities.

Q Do you recall the details of any of the epidemiologic studies that you've read about in these various journal articles?

A No.

Q Do you remember anything about the population that was studied in the articles that you've read?

A Compared smokers to non-smokers. There have been more recent articles dealing with passive smoke, and comparing those exposed to passive smoke to those that aren't, and looking at the incidence of ailments, trying to

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minimize the differences between these groups.

Q Well, it sounds to me like you're thinking of a particular study. Are you?

A No. No.

Q Can you identify any particular study that you've read and rely upon in expressing the opinions that you have here today?

A No. I would just say there's many.

Q Doctor, and I'm going to ask this question to you in a general way, and you shouldn't construe it as limited to smoking and lung cancer.

A Okay.

Q The question is: do you believe that finding a statistical relationship between a factor and a disease is alone sufficient to establish a cause and effect relationship between that factor and the disease?

A (Pause) That, by itself?

Q Yes.

A No, not necessarily.

Q What else is necessary?

A It would be nice to do a study and give that particular substance to people and see if you end up with the disease. That's a little inhumane, so we use rats many times.

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And, some of the studies with lung cancer have used animals, and, indeed, smoke has cancer-causing agents in them, gives cancer to these animals.

Then, we look at studies that, in smokers compared to non-smokers, and the smokers get more lung cancer.

So, you look at the data in the animals, and you look at the data in the people, and they come up with these statistics that smoking causes lung cancer.

Q Now, Doctor, you've referred to animal studies. Can you identify a single study in which laboratory animals were exposed to inhaled tobacco smoke and developed a statistically significant number of human type lung tumors?

A No.

Q Isn't it the case, Doctor, that all of the animal experiments that have been done with inhaled tobacco smoke, have been negative?

A I'm not familiar with the specific animal data.

Q Well, you can't identify anyone that's been positive?

A No.

(Pause)

Q Doctor, you're familiar with the reports of the surgeon general of the United States on smoking and health; is that correct?

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A That's correct.

Q Have you ever read an entire surgeon general's report cover to cover?

A No.

Q Have you ever done anything more than skim a surgeon general's report?

A No.

Q Are you familiar with the original report of the advisory committee to the surgeon general?

A No.

Q You haven't even skimmed that one?

A No.

Q Let me show you a passage from the 1964 report of the advisory committee to the surgeon general on smoking and health. Page 20.

Surgeon general's advisory committee stated, and I quote: "Statistical methods cannot establish proof of a causal relationship in an association. The causal significance of an association is a matter of judgment, which goes beyond any statement of statistical probability."

Now, that's consistent with your testimony here today; is that right?

A That's right, yes.

Q You would agree with that statement?

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A At times. Other times -- I mean, not across the board.

Q In what sense do you not agree with the surgeon general?

A Well, there's no -- that was 1964, and as we all know, there was a lot of pressure put on the government over these statements, and they've become stiffer and stricter year by year.

It's unfortunate that they weren't a little more specific with their statements back then. Not now.

Q Doctor, you're not suggesting, are you, that the surgeon general ever changed his mind with respect to this decision that --

A Not that surgeon general, but subsequent ones have. Now, that statement is, "It causes lung cancer." It's not maybe, and statistical, and this and that. It causes lung cancer.

Q Let's be clear here. We're talking about what statistical methods can do.

Can you identify for me any respect in which any surgeon general has ever departed from the statement set forth in this exhibit?

A I wouldn't know. I wouldn't know.

Q You can't identify any?

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A No.

Q And, in any event, you don't disagree with this statement on what can be done with statistics?

A That's correct. You can say anything you want with statistics.

Q (Pause) And people do?

A Yeah. (Pause) Such as, 10 percent don't matter.

Q Doctor, Mr. Cook had asked you some questions about your own experiences with cigarette smoking, and I wanted to get into that a little bit with you.

And, if I understand your testimony, you've experienced some difficulty in quitting cigarette smoking; is that correct?

A Yes.

Q But, you have managed to cut down on your cigarette smoking; is that correct?

A Yes.

Q And, at one time you were smoking at what level?

A Two packs a day.

Q And, what is your current level of consumption?

A An occasional one or two cigarettes.

Q And, when you say --

A Not daily.

Q So, you're now at the point where you're not even

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smoking a cigarette every day?

A That's correct.

Q On a weekly basis, how much are you smoking?

A Well, until the last couple of weeks, I was not smoking at all for several months, but I've sort of fallen off the wagon, so to speak, lately.

Q Now, you were still smoking at a level of about a pack a day when we took your deposition several months ago?

A That's correct.

Q So, since that time, you've managed to essentially discontinue your smoking?

A Since my heart attack the month after we had our deposition in June.

Q So, that gave you the motivation to give up your cigarette smoking?

A Yeah.

Q Would you agree, on the basis of your own experience, that someone who's sufficiently motivated to quit smoking can quit smoking?

A No, I wouldn't. I've got innumerable patients that just beg me to quit for them, but they can't -- a lot of them.

Q Okay. Now, Doctor, I'm going to ask you about some of your other patients in a minute, but let's finish up with

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you first.

Now, in quitting smoking now, you used the nicotine patch; is that right?

A I tried that in the past, and it failed.

Q How was it that you went about quitting this time?

A Well, I was in intensive care for two days, so you can't smoke there. That was the first time I've ever gone more than, you know, one day not smoking.

I was also sedated, and so that sort of gave me the start to get some time off the cigarettes, and had a lot of family support, and other things. The first real impetus to quit. I didn't have any choice.

Q Do I understand correctly that until this episode that you just described that you never previously went more than a day without smoking a cigarette?

A That's true, yes.

Q So, your prior efforts to quit never extended beyond a single day?

A No.

Q And, you mentioned a few moments ago that the nicotine patches that you tried previously were for you at least a failure?

A Yes.

Q Now, if I understand the principle behind the

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nicotine patches, they provide the smoker with the nicotine without the smoker having to inhale the tobacco smoke?

A That's correct.

Q Does your failure to quit with the nicotine patches suggest to you that there's more involved in cigarette smoking than just getting nicotine?

A Yes.

Q Are there psychological benefits that people derive from smoking cigarettes?

A That's correct.

Q What were some of those psychological benefits for you?

A (Pause) I'm not sure. I think it becomes so pervasive in your life that you associate smoking with pleasure of various sorts -- eating, drinking, with relaxation, taking a break in the job, all that sort of thing. So, I mean, it's associated with everything you enjoy.

Q And, did smoking have those associations for you?

A Yes. But, when I quit, I found out that it was more a habit in, you know, 20 years of doing it, rather than anything that I needed at those times to get from the cigarette.

Q Doctor, are you an expert in the areas of substance

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abuse or chemical dependency?

A Only my own personal experience.

Q You haven't had any specialized training in those areas, have you?

A No.

Q Do you regularly and routinely follow any journals that deal with those areas, substance abuse and chemical dependency?

A No.

Q Have you done any research on substance abuse, laboratory research on substance abuse, or chemical dependency?

A No.

Q Have you written any papers or made any presentations on those subjects?

A No.

Q Have you published any papers or made any presentations on cigarette smoking as an allegedly addictive behavior?

A No.

Q Are you familiar with the effects of alcohol and heroin abuse?

A (Pause) To some degree, just as I am with cigarettes.

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Q Do you know that alcohol and heroin abuse can interfere with a person's cognitive abilities?

A Uh huh.

Q Ability to make rational decisions?

(Pause)

Q Is that a yes?

A That's yes, yes.

Q Did cigarette smoking ever have that effect on you? Did you ever feel that it interfered with your ability to make rational decisions?

A I personally didn't, but, certainly, if you get your carbon monoxide level up enough, it can.

Q Was there ever a time when your cigarette smoking interfered with your ability to make rational decisions?

A No.

Q Can you ever think of a time when your cigarette smoking interfered with your job performance?

A Only in that I've many times left the hospital to go hide and have a cigarette, when I maybe could have been carrying on my duties as a physician.

Q Doctor, you're licensed to practice medicine in the state of Missouri; is that right?

A Yes.

Q And, as a practicing physician in the state of

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Missouri, you know that Missouri has laws dealing with physicians who become addicted to or dependent upon drugs; do you not?

A Yes.

Q Have you ever considered yourself impaired within the meaning of those statutes?

A No.

Q So, you recognize that your cigarette smoking is different qualitatively than addiction to alcohol or heroin; is that right?

A Yes.

Q Now, you mentioned your patients and other people that you've known and their experiences with smoking.

The question I have for you is whether you would agree that at least some people who are smokers can quit smoking?

A Yes.

Q And, in fact, the surgeon general has estimated that over 40 million people who at one time were smokers have quit smoking; you know that?

A Yes.

Q And, you don't have any reason to dispute the surgeon general's estimate; do you?

A No.

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Q And, you know also that the surgeon general has said that nearly half of all people who are still living, and who were any time in their life smokers, have now quit smoking?

A Yes.

Q And, you don't have any basis for disputing that either?

A No, I don't.

Q And, you know, too, that most people who quit smoking were people like yourself who did it without any outside assistance?

A That's correct.

Q Now, we've been talking about your own smoking experiences and those of your other patients, but what we ought to be doing here is focusing on Mr. Kueper here who, of course, brought this case.

A Yes.

Q Now, in the course of administering to Mr. Kueper over the course of the past several months, you've gotten to know him; would that be fair to say?

A Yes.

Q And, would you agree that he's a strong-willed kind of person?

A Yes.

Q Does he strike you as the kind of guy who has more

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willpower than some of the "Nervous Nellies" that you've treated over the course of the years?

A Yes.

Q And, is it also true that when Mr. Kueper first came to see you in August of 1991, he had already quit smoking by that time?

A That was my understanding, yes.

Q It was your understanding because that's what he told you?

A Yes.

Q And, you recorded that in your notes?

A Yes.

Q And, as far as you know, during the entire time that Mr. Kueper has been your patient, he has not been a cigarette smoker?

A That's right.

Q Would you also agree with me that the best measure of whether a person can quit cigarette smoking is whether that person has in fact quit cigarette smoking?

A That seems reasonable.

Q And, the fact that Mr. Kueper quit smoking cigarettes confirms that he could quit smoking cigarettes; right?

A Given the right impetus to do that, as in my case.

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Q And, he evidently had the right impetus?

A Yes.

Q Now, Doctor, one of the warning labels which appears on cigarette packages -- and you've alluded to the warning label here -- but one of the warning labels on cigarette packages says that quitting smoking reduces your risk. Were you aware of that?

A Yes.

Q Do you agree with that?

A Yes.

Q Do you advise your smoking patients to quit?

A Certainly.

Q And, has that been your practice the whole time you've been practicing pulmonary medicine?

A Yes.

Q And, in your experience, is that what your professional colleagues do?

A Yes.

Q All of the other doctors you know who have smoking patients advise their patients to quit?

A Yes.

Q And, they've done that for a long time?

A Yes.

Q And, you wouldn't do that unless you really believed

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that smoking -- quitting smoking does reduce your risk?

A Or that I really believed it causes all these diseases, as well.

Q And, you believe that by quitting smoking, a smoker will reduce his or her risk of developing these various diseases?

A Yes.

Q And, that's why you tell the smoker to quit?

A That's correct.

Q And, after a smoker has quit smoking, his risk over time declines and begins to approach that of a non-smoker; is that right?

A It declines. I'm not sure I would say -- I don't know that we know that it ever approaches that of a non-smoker. We're talking about risks of lung cancer now, I guess.

Q Sure. Would you agree that ten to 15 years after quitting smoking, that the ex-smoker's risk is only slightly more than that of a non-smoker?

A Yes. You say ten to 15. I would say 15.

Q So, after 15 years, a smoker is -- a former smoker's risk is only slightly more than that of a non-smoker?

A Yes.

Q You're familiar with former Surgeon General Koop?

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A Koop, yes.

Q Reliable guy?

A I think so.

Q Trustworthy on subjects like quitting smoking and the effects of quitting smoking?

A Yes.

Q Doctor, don't you think that it's inappropriate to disagree with the Surgeon General of the United States?

A Probably, but I do.

Q Now, you would agree that after 15 years, a smoker's risk declines to the point where it's only slightly greater than that of a non-smoker, but you wouldn't go so far as the surgeon general to say that the smoker's lung would be pure as the day he was born?

A That's right.

Q So, applying what we've just been talking about to Mr. Kueper, if he had quit smoking in 1966, when the first package warnings appeared, then his risk of developing lung cancer by 1991 would have been only slightly greater than that of a non-smoker; is that a fair statement?

A Yes.

Q In fact, if Mr. Kueper had quit smoking at any time, up until 1976, that would be the case; correct?

A Yes.

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Q Now, Mr. Cook had asked you over our objections some questions about a diagnosis that you had made in December of 1991 of an obstructive lung problem with Mr. Kueper. Do you recall those questions?

A Yes.

Q I'm going to get to that point in a while, but let me begin by taking you back to the spring of 1991 when you testified that Mr. Kueper's cancer was diagnosed.

Now, at that time, I think we've established, he had a series of x-rays and CAT scans?

A Yes.

Q And, would you agree with me, sir, that there's nothing in those films which shows any obstructive or emphysematous changes in Mr. Kueper's lungs?

A Yes.

Q Now, you saw Mr. Kueper in August of 1991 for the first time, right?

A Yes.

Q And, he had another CT scan done at that time; is that correct?

A That's correct.

Q And, the radiologist who administered that scan did not interpret it as showing emphysema, or COPD, or obstructive lung disease?

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A That's correct.

Q And, you didn't read it that way, either, did you?

A No.

Q Now, you did pulmonary function testing on Mr. Kueper in August when you saw him; is that correct?

A Yes.

Q Would you describe briefly what that process involves?

A The patient empties his lungs, and then fills them up to maximal inspiratory volume, and then exhales all that air into a machine, that then calculates what that total air volume is that they exhale, and measures the air flow over time, which is then plotted on a graph.

Q And, when you got the results of those tests, you didn't read them as showing COPD, did you?

A Generally, I don't give them a diagnosis because they -- pulmonary function studies don't give you a diagnosis. They give you a physiologic number. That then, it's up to the clinician to assimilate that with the other data and make a diagnosis.

Q Well, when you, as the clinician that Mr. Kueper saw, assimilated the results of the pulmonary function testing done in August of 1991, you didn't interpret that as showing an obstructive change?

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A That's correct.

Q In fact, the tests that were done at that time were interpreted as showing a mild chest restriction; is that correct?

A Yes.

Q Now, that's different than COPD; isn't it?

A Generally, yes.

Q Now, we talked before about your bronchoscopy in August of 1991, and you didn't, at that time, see anything during the bronchoscopy that looked like emphysema, did you?

A You can't see emphysema with a bronchoscope.

Q You can't, and you didn't?

A Right, can't, and you don't. No one can.

Q And, your notes of the August, 1991 visit that Mr. Kueper made the first time he saw you, they don't reflect any finding of emphysema by you or COPD, do they?

A No.

Q And, the very first time that you diagnosed COPD in Mr. Kueper was in December of 1991; is that correct?

A Yes. Yes.

Q That was four months after you first saw him?

A Yes.

Q And, you didn't do another CT scan in December, did you?

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A I don't recall when the next one was.

Q Your diagnosis of COPD at that time wasn't based on anything you saw on the CT scan?

A No. No.

Q You didn't do another bronchoscopy on him in December, did you?

A No.

Q So, your diagnosis of COPD wasn't based on the findings of bronchoscopy; is that correct?

A That's correct.

Q And you --

A You don't diagnose COPD with a bronchoscope, though, and you don't diagnose it with a CAT scan either.

You can diagnose emphysema with a CAT scan, but there's other obstructive components that you diagnose with your ears.

Q Did you do any pulmonary function testing in December at the time you diagnosed COPD?

A I don't think so.

Q Now, you can use pulmonary function testing as a basis for diagnosing COPD, can't you?

A That's correct.

Q You didn't do any additional PFTs in December, though?

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A No.

Q So, the diagnosis you made at that time was not based on any pulmonary function testing?

A No.

Q In fact, your diagnosis of COPD in December of 1991 was based entirely on the fact that Mr. Kueper was experiencing bilateral wheezing, and your knowledge that he had been a cigarette smoker, and nothing more; correct?

A Correct.

Q The wheezing, Doctor, that you noted in December, could that have been caused by a condition other than emphysema, for example, a restrictive defect.

A Restriction doesn't generally cause wheezing.

Q But, it can?

A (Pause) I can't think of any instance where it would.

(Pause)

Q Doctor, we talked before about your deposition last August, and you do remember that deposition?

A Yes.

Q The question, Doctor, is, have you ever expressed a contrary opinion as to whether a restrictive abnormality could cause wheezing?

A I apparently did. Not to my knowledge, though.

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Q Okay. We were talking before about your deposition back in May, and at that time were you asked the following question, and did you give the following answer.

MR. COOK: Which line?

MR. STUHAN: Line 17, page 36.

BY MR. STUHAN:

Q "On the pulmonary function test that you had conducted in August, you had concluded that he, Mr. Kueper, had a mild restrictive abnormality. Could a restrictive abnormality produce wheezing?

"Answer: Occasionally, not classically."

Now, do you recall back in May when we took your deposition being asked that question and giving that answer?

A No.

Q You don't recall that?

(Pause)

Are you denying that you gave that answer?

A No. I mean, I just don't recall giving that answer or that question.

Q Are you changing your testimony now? Is it your opinion now that a restrictive abnormality cannot ever under any circumstances cause wheezing?

A (Pause) Yeah. I will say, there's a disease -- and I can't think of the name of it -- that, if you measure lung

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function, it's -- well, actually, it's the other way around.

It's an obstructive disease, but it causes pulmonary fibrosis, so wheezing could be present in that situation. But, this would have nothing to do with Charles Kueper, so it is a moot point.

MR. STUHAN: I want to take a five-minute break and go over my notes and see what we have to do.

THE COURT: Okay. What have we got, about 20 more minutes? 29? We are going to finish that in the morning.

Okay. At this time I want to remind everyone again, you are not to discuss the case with anyone at home, with each other. No contact with the newspaper or electronics media. No homework. Nothing to look up. You are not to base the case on anything other than what you hear in the courtroom.

Okay. Thank you very much. Have a nice evening. Oh, the time -- Nine-fifteen.

Did you have trouble parking today?

JURORS: Yes.

THE COURT: Why don't we start at eight-thirty and you won't have any trouble parking -- (Laughing) -- Nine-fifteen. Nine-fifteen.

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(Whereupon, at the hour of 4:30 P.M., Court adjourned to reconvene at 9:15 A.M. on Tuesday, January 12, 1993.)

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